



Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-89-25

FACTS:

You represent the College Alumni Association, Inc., (Association) a private, non-profit corporation formed to promote the interests of the state college and its alumni and to provide services and programs that benefit and develop the student, faculty, staff and student bodies. According to its bylaws, the Association operates independently in its goal to further the interest of the alumni, and the Commonwealth. Eligibility for membership in the Association is available to alumni and others who were enrolled for two years and whose classes have graduated.

The Association wishes to invite a college coach "to address and participate in meetings and events of [the Association's] membership." Specifically, the Association would like the coach to speak at alumni functions located off campus. The Association wishes to provide the coach with honoraria for these formal presentations. Funds for the honoraria could be derived solely from private sources. An agreement between the Association and the coach would provide honoraria for each speaking engagement for four years. The Association maintains that the coach's speaking fee comports to fees that would be paid to a similarly qualified individual. The preparation and delivery of the speeches will be accomplished outside of the coach's regular working hours.

The coach states that he has no official duties concerning the Association. He states that any formal speaking engagements he presents to the nation would be outside of his college duties. For example, he would not give a formal presentation while he is out of town for a school athletic event.

The Legal Counsel that the state college has provided his opinion that the proposed series of speaking engagements would "not fall within the scope of the coach's official duties." He concludes that the coach's duties "would allow and perhaps require, the coach to make informal presentations to local groups in the immediate campus area during regular working hours as he determines. This is distinctly different from the proposed program which involves formal presentations on the coach's personal time off campus without the involvement of college resources and at a time and place determined by the Association." Additionally, the Counsel states that the speaking program would not be connected to any fundraising activity by the Association. The coach joins the Association's request for this opinion.

QUESTION:

May the Association offer to the coach and may he accept honoraria for four

engagements per year, for four years in exchange for the coach's formal speaking presentations off campus as arranged by the Associations .[1]

ANSWER:

The honorarium may be offered and accepted only if the speeches meet the standards enurnerated below.

DISCUSSION:

In his capacity as a college coach, the coach is considered a "state employee" within the meaning of the conllict law, G.L.c. s.1(q).

Section 3(a) prohibits an offeror of an item of substantial value from giving anything valued at \$50 or more to a present or former state, county or municipal employee for or because of any official act performed or to be performed by such employee[2] A corresponding provision under s.3(b) prohibits the public employee from accepting an item of substantial value for or because of his official duties. The Commission has previously stated that s.3 prohibits the offering of a gift of substantial value to a public employee where there is a connection between the motivation for the gift and the employee's duties. See, In the Matter of George Michael, 1981 SEC 59. Section 3 also prohibits additional compensation to a public employee for or because of his official duties. The preventative purpose of s.3 is to preclude public employees from "temptations which would undermine the impartial performance of their duties, and permit multiple remuneration for doing what employees are already obliged to do a good job." Id. at p. 68. See also, EC-COI-88-20; 84-101.

Under s.3, the Association would be prohibited from offering and the coach would be prohibited from accepting honoraria of substantial value for speaking engagements if such speeches were considered as part of his official college duties. Under the facts presented, however, the coach states he has no official duties with respect to the Association. The college Legal Counsel has also determined that the Coach's proposed formal presentations to the Association would fall outside the scope of his official college duties. The Counsel notes that the Coach's official position may well require him to "make informal presentations" to local groups during his normal working hours, he concludes that this differs from the Coach's presentations to the Association because they would be formal speeches presented off campus and on his own private time.

The Commission will ordinarily defer to an appointing official's interpretation of a public employee's job description unless it is unreasonable or it would frustrate the purposes of c. 268A. See, EC-COI-88-17; 83-137. The Commission thus defers to the counsel's interpretation that coach's official duties do not include formal presentation on his private time off campus. See, EC-COI-88-10.[3]

Section 23, the standards of conduct provision, applies to a public employee's actions which create the appearance of a conflict of interest. Section 23(b)(2) prohibits a state,

county or municipal employee from using his official position to secure for himself or others unwarranted privileges or exemptions of substantial value which are not properly available to similarly situated individuals. The Coach would violate this section by using his official position to obtain the series of Association's speaking engagements, worth more than \$50, if it is unwarranted and not available to similarly situated individuals.

Under s.23, the Commission has on numerous occasions considered issues pertaining to speaking engagements given by public employees and the receipt of honoraria. See, Commission Advisory No. 2; EC-COI-80-28 pertaining to members of the general court giving speeches) EC-COI-86-11 (judge would violate s.23(b)(2) if he accepted honoraria of substantial value while also receiving his regular state compensation). In EC-COI-82-43, the Commission enumerated four criteria which must be met in order for a speaking engagement to be permissible under s.23. The four requirements are:

1. state supplies or facilities not available to the general public are not used in the preparation or delivery of the address;
2. state time is not taken for the preparation or delivery of the address;
3. delivering the speech is not part of the state employee's official duties; and
4. neither the sponsor of the address nor the source of the honorarium, if different, is a person or entity with which the state employee might reasonably expect to have dealings in his official capacity.

Under the facts presented, the Coach appears to meet all four criteria.

An additional issue remains, however, whether the series of speeches by the coach to the Association would be legitimate. As outlined in {Commission Advisory No. 2}, the Commission considers several factors in determining whether a speaking engagement is legitimate. See, EC-COI-83-87. In order for a speaking engagement to be considered legitimate, it must be:

1. formally scheduled on the agenda of the meeting or conference;
2. scheduled in advance of the speaker's arrival at the meeting or conference;
3. before an organization which would normally have outside speakers address them at such an event; and
4. the speaking engagement must not be perfunctory, but should significantly contribute to the event, taking into account such factors as the length of the speech or presentation, the expected size of the audience, and the extent to which the speaker is providing substantive or unique information or viewpoints.

If these four factors are not satisfied, no fees or expenses may be received.

In drafting your proposed speaking arrangements with the coach, you may have been unaware that the legitimacy of the speeches would be a factor in determining whether the honoraria would be permitted under G.L. c. 268A. If this is so, the Commission anticipates that you will take the opportunity to evaluate the proposed honoraria in light of the considerations enumerated above.[4]

DATE AUTHORIZED: August 29 1989

[1] The Commission presumes, for the purposes of this opinion, that the Association is a private, nonprofit corporation which is not considered a state entity for the purposes of the conflict law. See, EC-COI-89-18.

[2] See, {Commission Advisory No. 8}.

[3] To the extent that the coach's proposed activities may be considered as outside employment, no state agency would appear to be a party to or have a direct and substantial interest in the matters for which he will be receiving compensation. G.L. c. 268A, s.4.

[4] We note that the advice contained in this opinion is limited to the application of G.L. c. 268A to the facts presented. Additional rules or regulations, such as those promulgated by the athletic associations to which the college belongs, may also be applicable.